U.S. Department of Homeland Security
20 Mass. Ave.. N.W.. Rm.3000
Washington. DC 20529 - 2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] OFFICE: CALIFORNIA SERVICE CENTER Date: FEB 1 0 2009

XPN 91 027 0132

IN RE: Applicant: [redacted]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for adjustment from temporary to permanent resident status was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The director denied the application because the applicant had been convicted of one felony.

On appeal, counsel concedes the fact of the felony conviction, but indicates that the conviction was expunged under a statute similar to the Federal First Offender Act (FFOA) and thus has no effect for immigration purposes.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.3(c)(1). "Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

> The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The record reveals that the applicant was convicted in the Superior Court of California, County of Los Angeles, of *Possession of Narcotic Controlled Substance,* a felony offense under CA Health & Safety Code § 11350, and *Driving a Vehicle with Blood Alcohol Content of .08% or More,* a misdemeanor offense under CA Vehicular Code § 23152, on March 16, 2001 (Case [redacted]. The court entered a Deferred Entry of Judgment on the possession charge, which was subsequently terminated and a guilty plea entered upon the applicant's failure to appear as required. The court later, on October 17, 2003, set aside the guilty plea and dismissed the possession charge under CA Penal Code § 1000.3. In a separate proceeding in the Municipal Court of San Pedro Courthouse Judicial District, County of Los Angeles, the applicant was convicted of *Receiving/Concealing*

Stolen Property, a misdemeanor offense under CA Penal Code § 496(a), on December 13, 1999 (Case #[redacted]

On appeal, counsel argues that the applicant's narcotics conviction was subsequently expunged pursuant to California's drug diversion program and is no longer a valid conviction for immigration purposes. Counsel cites *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) in support.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

The applicant argues that his felony conviction has been expunged and is no longer a valid conviction for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The AAO has reviewed the cited authority and concludes that the expungement of the applicant's conviction in this case fits within the parameters outlined in *Lujan-Armendariz.* In that case, the Court held that an alien defendant who had been convicted as a first time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand "convicted" for immigration purposes, because the alien defendant would have qualified for treatment under the FFOA had he been charged with federal offenses. 18 U.S.C. § 3607 (2000), *Lujan-Armendariz v. INS*, 222 F.3d 728, 738. Thus, an expunged conviction under a state rehabilitative statute will have no immigration consequences *only if* the alien defendant could have received FFOA treatment had he been charged under federal drug laws.

Under the relevant provisions of the FFOA, a criminal defendant will not be considered to have a "conviction" for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if he or she has no prior drug offense convictions, has not previously been the subject of a disposition under FFOA, and was placed on a term of probation. If the defendant has not violated the terms or conditions of probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him or her from probation. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007). This rule regarding expungements pursuant to the FFOA was formally adopted in immigration proceedings by the Board of Immigration Appeals (BIA) in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The BIA held that any alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of the FFOA had he been prosecuted under federal law. *Matter of Manrique, id.*

Like the alien defendant in *Lujan-Armendariz,* the applicant in the matter presently before the AAO would have qualified for disposition under the provisions of the FFOA. First, the AAO observes that the crime for which the applicant stands convicted is a first time offense for "simple possession of a controlled substance." He has not previously been the subject of a disposition under the FFOA, and he was sentenced to a term of probation. The entry of judgment was deferred, and the applicant was placed on probation for a period of 18 months. Ultimately, the court granted the applicant's motion to set aside the guilty plea, pursuant to section 1000.3 of the California Penal Code. Thus, the applicant would have qualified for treatment under the FFOA had he been charged with a federal offense. Therefore, the applicant's expungement under California state law is the equivalent of treatment under the FFOA, and is not a valid felony conviction for immigration purposes. The director's decision to the contrary is withdrawn.

The AAO notes that the applicant may be inadmissible for the misdemeanor conviction of receiving/concealing stolen property. An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

The AAO has reviewed the statutory provisions and the relevant case law of the Ninth Circuit Court of Appeals, the jurisdiction in which this case arises. The AAO concludes that a conviction under § 496(a) of the California Penal Code, receiving/concealing stolen property, is a crime of moral turpitude. *See Tall v. Mukasey*, 517 F.3d 1115, 1119 (9th Cir. 2008) (an offense that has an element of intent to defraud or is inherently fraudulent by nature categorically qualifies as a crime involving moral turpitude). In the matter presently before the AAO, the applicant has a criminal conviction for receiving/concealing stolen property, which has the element of intent to defraud, and thus constitutes a crime involving moral turpitude.

Section 212(a)(2)(A)(ii)(II) of the Act provides for an exception to inadmissibility of an alien convicted of only one crime of moral turpitude if:

> the *maximum* penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year ***and***, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).

(Emphasis added).

As noted above, the applicant was convicted under CA Penal Code § 496(a) of *Receiving/Concealing Stolen Property,* a misdemeanor offense, in the Municipal Court of San Pedro Courthouse Judicial District, County of Los Angeles, (Case # [redacted] The maximum sentence for a misdemeanor offense under this section of law is imprisonment in a county jail for a

period not exceeding one year. The applicant was placed on summary probation for 36 months and ordered to serve 2 days in the county jail. The applicant qualifies under the petty offense exception as the maximum sentence for the crime of which he was convicted did not exceed imprisonment for one year, and he was not sentenced to a term of imprisonment in excess of six months. The applicant is thus not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for conviction of a crime involving moral turpitude.

The applicant remains convicted of 2 misdemeanor offenses. Conviction of two misdemeanor offenses does not render the applicant ineligible for adjustment to permanent resident.

The AAO notes that the applicant lists one absence of 28 days between the date of approval of the Form I-687 and the date the applicant applied for or became eligible for permanent resident status. An alien shall be regarded as having resided continuously in the United States for the purpose of this part if, at the time of applying for adjustment from temporary to permanent resident status, or as of the date of eligibility for permanent residence, whichever is later, no single absence from the United States has exceeded thirty days, and the aggregate of all absences has not exceeded ninety days between the date of approval of the temporary resident application, Form I-687, and the date the alien applied or became eligible for permanent resident status, whichever is later, unless the alien can establish that due to emergent reasons or circumstances beyond his control, the return to the United States could not be accomplished within the time period(s) allowed. A single absence from the United States of more than 30 days, and aggregate absences of more than 90 days during the period for which continuous residence is required for adjustment to permanent residence, shall break the continuity of such residence, unless the temporary resident can establish that he did not, in fact, abandon his residence in the United States during such period. 8 C.F.R. § 245a.3(b)(2).

Pursuant to the above regulation, the period in question in terms of absences is from the date of approval of temporary residence (April 6, 1989 in this case) until the date of filing for adjustment to permanent residence (November 7, 1990) or the date the applicant became eligible for permanent residence (November 5, 1990), whichever is later. That last figure reflects the applicant's eligibility for permanent residence beginning nineteenth months from the date of approval of temporary residence, pursuant to section 245(A)(b)(1)(A) of the Act, 8 U.S.C. § 1255a(b)(1)(A). Thus, the period during which the applicant must have maintained continuous residence in this case is from April 6, 1989 to November 5, 1990. As noted above, the applicant claimed to have been absent for 28 days prior to November 7, 1990, the date of filing the Form I-698. Thus, the record reflects that he maintained continuous residence in the United States for the requisite period following the approval of the Form I-687.

The denial of permanent residence is withdrawn. The director shall complete the adjudication of the application for permanent residence.

ORDER: The appeal is sustained.